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Supreme Court, U.S.
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No. 06-833

In The
SUPREME COURT OF THE UNITED STATES

DAVID J. SITOMER, ET AL.

Petitioners,

v.

RUFUS G. KING, III
AS CHIEF JUDGE OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
ET AL.

Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit had jurisdiction to hear the case, which involved a claim for money damages, not limited to $10,000 per Plaintiff, against, inter alia, the judges of the D.C. Superior Court, an Article I court, because of the requirements of the Tucker Act, 28 U.S.C. §§ 1292 and 1346, and the U.S. Constitutional claims, or whether the Federal Circuit Court had exclusive jurisdiction for this claim.

LIST OF PARTIES IN THE D.C. COURT OF APPEALS

Annie Alexander
Glen Angelo
Marion Chou
Bruce Denslow
Michael Hendrickson
John J. McCabe, Jr.
David J. Ontell
David J. Sitomer
Russell Torwelle

Ronna Beck, *Associate Judge of the D.C. Family Court*
Anna Blackburn-Rigsby, *formerly Associate Judge of the D. C. Family Court*
Wilma Brier, *Director of the D.C. Office of Counsel for Child Abuse and Neglect*
Avis Buchanan, *Director of the Public Defender Service of the District of Columbia*
William Jackson, *Associate Judge of the D.C. Family Court*
Ramsey Johnson, *Associate Judge of the D.C. Family Court*
Anita Josey-Herring, Associate Judge of the D.C. Family Court
Rufus G. King, III, *Chief Judge of the Superior Court of the District of Columbia*
Juliet McKenna, *formerly Magistrate Judge of the D.C. Family Court, now Associate Judge of the D.C. Family Court*

Robert Morin, *Associate Judge of the D.C. Family Court*
Thomas Motley, *Associate Judge of the D.C. Family Court*
William Nooter, *Magistrate Judge of the D.C. Family Court*
Hiram Puig-Lugo, *Associate Judge of the D.C. Family Court*
Reginald Ramdat, *Administrative Services Division, Procurement and Contracts, D.C. Superior Court*
Rhonda Reid-Winston, *Associate Judge of the D.C. Family Court*
Robert Richter, *Associate Judge of the D.C. Family Court*
Herbert Robinson, *Director of the Office of Administration for the Criminal Justice Act (P.D.S. employee)*
Lee F. Satterfield, *Chief of the D.C. Family Court of the Superior Court of the District of Columbia*
Ronald *Sullivan formerly Director of the Public Defender Service of the District of Columbia*
Susan Winfield, *formerly Associate Judge of the D. C. Family Court, presently Senior Status Judge of the D.C. Superior Court*

John and Jane Does, 1-100

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OPINION BELOW

The District of Columbia Court of Appeals issued opinion No. 05-7060 under the name of Pamela Roth et al. v. Rufus G. King, III, as Chief Judge of the Superior Court of the District of Columbia, et al., Herb Robinson as Director of the Office of Administration for the Criminal Justice Act., Appellees on June 9, 2006. The decision is reported at 449 F.3d 1272 (D.C. Cir., 2006). The opinion is reprinted in the Appendix at pp. 1-24

JURISDICTION

The D.C. Circuit filed its decision on June 9, 2006, denying the Petitioners' motion to remand back to the U.S. District Court for lack of jurisdiction and reversing the decision of the lower Court as to those counts of the complaint that the U.S. District Court had failed to dismiss previously. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

U.S. CONSTITUTIONAL PROVISIONS

ARTICLE I, SECTION 8, CLAUSE 9

§ 8: The Congress shall have Power:
Clause 9: To constitute Tribunals inferior to the Supreme Court.

ARTICLE IV, SECTION 3, CLAUSE 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3156(a)(1)

(a) As used in sections 3141-3150 of this chapter-

(1) the term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia:

28 U.S.C. §1292(b)

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals thereof shall so order.

28 U.S.C. § 1295(a)(2)(2000)

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction-

(2) of an appeal from a final decision of a district court of the United States ..., if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, ...

28 U.S.C. § 1346

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue law;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any motion of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(l) and 10(a)(l) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force &change Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after 1945, for injury or loss of property, or personal injury or death caused by the neglect or willful act or omission of any employee of the Government while acting within

the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

28 U.S.C. §1491(a)(l)

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purposes of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall
be considered an express or implied contract with the United States.

28 U.S.C. §1631

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2671

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504 or 505 of title 32, and persons acting on behalf of a federal agency in an official

capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF FACTS

Petitioners are nine individual attorneys who have in the past accepted appointments from the District of Columbia Superior Court in juvenile and child abuse and neglect cases, pursuant to D.C. Code §1 1-2601 and D.C. Code § 16-2304. According to statute, attorneys are to be reasonably and fairly compensated for their services, and for appointments after March 1, 2002, these attorneys are paid at an hourly rate of $65.00. In 2002, by Administrative order, the Chief Judge of the Superior Court created Family Court Panels to select four panels of attorneys anew from which to appoint attorneys for juvenile and neglect cases. There was no grandfather provision in the system for the attorneys who had already been doing this work. Petitioners stand in a variety of postures, but each of them either was not selected for any of the new panels or was not selected for some of the new panels. In their Second Amended Complaint, they sued the Chief Judge of the Superior Court, Rufus King, III, the other judges serving in the family Court and some other persons who help administer the appointment system in various ways.

The complaint listed 28 U.S.C. § 1331 as the basis of jurisdiction, 28 U.S.C. §1337, 28 U.S.C. § 1361 and 28 U.S.C. §1367, 42 U.S.C. § 1983, the lst, 5th and 6th Amendments to the U.S. Constitution, Article I, §10 of the U.S. Constitution, the Impairment of Contract clause, and the Competition in Contracts Act, 41 U.S.C. §253. The suit asked for class certification for those similarly situated. The request for class certification, however, was never ruled upon by any Court.

Plaintiffs' Constitutional claims in their complaint included (1) Defendants violated the Plaintiffs' property

interest in their specialty practice; (2) Defendants violated the property interests that Plaintiffs had in their then-existing caseloads; (3) The Defendants violated the Plaintiffs' First Amendment right to contract with the Court, existing clients and potential clients; (4) the Defendants violated the Plaintiffs' right of free association and free speech; (5) the Defendants have violated the Plaintiffs' due process rights. The Plaintiffs prayed for relief, inter alia, asking for class certification and asking for relief in the amount of $40,000,000 cumulatively, declaratory judgment, and a temporary and permanent restraining order.

Before discovery was permitted, the Defendants filed a joint motion to dismiss the complaint, and the District Court granted the motion in part and denied it in part on March 11, 2005. The Defendants moved the District Court for certification for an interlocutory appeal pursuant to 28 U.S.C. 1292(b) and to stay all proceedings pending appeal. On April 21st, 2005, the U.S. District Court granted the Defendants' motion for certification of the case to the U.S. Court of Appeals for D.C. and stayed the proceedings pending further resolution of the case.

The Appellees moved the U.S. Court of Appeals for D.C. for permission to appeal on an interlocutory basis. The Petitioners opposed that motion in the U.S. Court of Appeals, but not on the basis of lack of jurisdiction. The U.S. Court of Appeals for D.C. granted the Respondents' motion to appeal on an interlocutory basis, and the Respondents proceeded to file their briefs. During the brief writing process, on January 9, 2006, Petitioners discovered newly an issue of jurisdiction and filed an unconsented motion to remand the case back to the District Court for transfer to the Court of Federal Claims, due to lack of jurisdiction.

The Petitioners' claim of lack of jurisdiction of the U.S. Court of Appeals for the D.C. Circuit was based on 28 U.S.C. §1346. The Petitioners admitted that they did not specifically cite 28 U.S.C. §1346 in their complaint but noted that the duty of the appellate court and the district court is to look to "the true nature of the action instead of the Plaintiffs' characterization of the case" relying on *Katz* v. *Cisneros*, 16 F.3d 1204, 1207 (Fed. Cir., 1994). The Petitioners noted that a part of the U.S. government, to wit, Article I judges acting in their official capacity as part of an Article I Court, that is, the Family Court of the Superior Court of the District of Columbia, are some of the Defendants in the case. Thus, Petitioners reasoned that the only possible way their action could proceed is under the provision of 28 U.S.C. §1346. Appeals from cases under 28 U.S.C. §1346, including interlocutory appeals, vest jurisdiction exclusively in the U.S. Court of Appeals for the Federal Circuit. See 28 U.S.C. §1292(b).

On the other hand, the U.S. District Court had questionable jurisdiction to make its decision because 28 U.S.C. §1347 limits the jurisdiction of such claims in the various U.S. District courts throughout the nation to a maximum of Ten Thousand Dollars ($10,000). The Petitioners noted to the U.S. Court of Appeals for D.C. that the waiver of damages to Ten Thousand Dollars per litigant must be clear, relying on *Waters v. Rumsfeld,* 320 F.3d 265 (D.C. Cir., 2003), and the Petitioners had not made clear in the U.S. District Court as to whether or not each Plaintiff was agreeing to limit his or her respective damages to Ten Thousand Dollars ($10,000). In such circumstances, the Petitioners pointed out, the case should be remanded to the U.S. District Court for possible transfer to the U.S. Court of Claims. The Petitioners pointed out to the U.S. Court of Appeals that the fact that U.S. District Court had dismissed the money claims and that the appeal was noted by the

Defendants was irrelevant to the jurisdiction because the jurisdiction is based solely on the Plaintiffs' claims, and the jurisdiction does not change depending upon who noted the appeal, the Plaintiffs or the Defendants. The sole measure of jurisdiction is based on whether the Plaintiffs' claims contain one or more Tucker Act issues.

The Respondents responded by filing a motion to strike Petitioners' motion to remand the case back down to the U.S. District Court in lieu of answer. On March 24, 2006, the U.S. Court of Appeals for the D.C. Circuit denied the Respondents' motion to strike the Petitioners' motion to remand the case, ordered the Respondents to answer the motion and noted: "..the motion to remand raises a jurisdictional question that the court is obligated to consider even if not raised by the parties. See *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Beckett v. Airlines Pilots Ass'n.*, 59 F.3d 1276, 1278, n.2 (D.C. Cir. 1995)." The circuit Court then ordered that the motion to dismiss for lack of jurisdiction be referred to the merits panel that would consider the entire case.

The Respondents then filed a joint opposition to the Petitioners' motion to remand the case back down to the U.S. District Court, claiming that while not denying that the Superior Court judges are Article I judges, that the U.S. Court of Appeals for the District of Columbia has never equated Superior Court judges or other judicial officials of the District of Columbia with the United States for Tucker Act jurisdictional purposes. The Petitioners filed a reply to the Respondents' opposition.

In its opinion, the D.C. Circuit panel ruled that it, not the Federal Circuit Court of Appeals has jurisdiction because it ruled that the Superior Court should not be "treated" as part of the United States. They reasoned that case law and other federal statutes generally treated the D.C. courts like state courts. Therefore, reasoning that a suit against Article I

judges [of the D.C. Superior Court] is not a suit against the United States, the Court ruled that there is no merit in Petitioner's claims that the Court of Federal Claims has exclusive original jurisdiction because the Petitioners did not expressly waive damages in excess of Ten Thousand Dollars ($10,000). The Circuit Court also ruled that the Tucker Act grants the Court of Federal Claims jurisdiction over suits against the United States, not against individual federal officials. The Circuit Court then proceeded to rule that the Appellees have not stated a claim for which relief can be granted under the Due Process Clause or under the 5th Amendment. Therefore, they reversed the ruling of the District Court to the extent that the District Court did not entirely grant the Respondent's motion to dismiss the case for failure to state a claim.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT OF COLUMBIA CIRCUIT IS MAKING A DECISION THAT AFFECTS THE JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT WITHOUT THE FEDERAL CIRCUIT HAVING ANY ABILITY TO COMMENT ON THE RULING. THEREFORE, THIS COURT SHOULD SUPERVISE THE OPERATION OF THE FEDERAL CIRCUITS TO PROTECT THE EXCLUSIVE JURISDICTION OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT FOR ITS DESIGNATED SUBJECT MATTER.

This Court has not hesitated in the past to clarify the proper balance of jurisdiction between the various circuits. *United States v. Hohri*, 482 U.S. 64 (1987). While the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the Federal Circuit have certain statutory preferences because of their respective locations in our nation's capital above the other Circuits, this Court has not hesitated to supervise the proper balance depending on the nature of the claims. In *Hohri*, supra, this Court ruled that in cases of mixed claims including both a Tucker Act claim and a Federal Tort Claim Act claim, the Tucker claim predominates, giving the jurisdiction to the Federal Circuit, even though a Federal Tort Claim Act claim standing alone would be appealed to the D.C. Circuit. This Court noted that the Tucker Act and a nontax Little Tucker Act claim form a comprehensive framework with Congressional expression of a strong need for uniformity in the rulings where the United States stands as a Defendant. This Court stated a p. 73 of the opinion that "...one would expect any exception intended by Congress to have been

made explicit, rather than left to inferences drawn from loose language."

Further, it has long been established that the Courts in the territories of the United States, of which the District of Columbia is one, are Article I Courts. *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828). Indeed, a history of Article I judges is set out in *Glidden v. Zdanok et al.*, 370 U.S. 530, 545 (1962). This Court noted that the use of Article I judges in territories is quite practical because the territories might become states, and the U.S. Government would not want to be left with a large number of judges appointed for life in the U.S. Courts. While this Court did have occasion to rule that the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia stand in a different posture from the usual territorial courts in that the territory of the District of Columbia used to be a part of two states and that therefore those Courts had to be Article III Courts, see *O'Donoghue v. U.S.*, 289 U.S. 516 (1933), this Court also had no problem with Congress establishing two sets of parallel courts for the District of Columbia, the U.S. Court system being Article III courts and the Superior Court and the District of Columbia Court of Appeals being Article I courts. See *Palmore v. U.S.*, 411 U.S. 389 (1973). This Court recognized at p. 407, "These courts were expressly created pursuant to the plenary Article I power to legislate for the District of Columbia."

This Court has also admonished the courts and the legal community that jurisdictional statutes are to be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. U.S.*, 392 U.S. 206, 212 (1968). Petitioners submit that the D.C. Circuit in the instant case has violated this admonition and made unwarranted inferences from loose language. In *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) quoting from *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723,

756 (1965)(POWELL, J. concurring), this Court stated that the "starting point in every case involving construction of a statute is the language itself."

Significantly, the D.C. Circuit did not cite one statute that Congress passed that indicated that the Superior Court was not an Article I Court for Tucker Act purposes. The plain words of the Tucker Act state that the Federal Circuit Court of Appeals shall have exclusive jurisdiction of suits against the United States. The D.C. Circuit appears to have violated the letter and the spirit of *Cheng Fan Kwok, supra* and *Kelly v. Robinson, supra.* The lower Court did not act with fidelity to the terms by which Congress has expressed its wishes.

Instead, the lower Court looked to two of its own previous decisions to try to make analogies which were not part of any expression of the intent of Congress pertaining to the Tucker Act. In *Handy v. Shaw et al.,* 325 F.3d 346 (D.C. Cir. 2003), the lower Court ruled in a case of parallel lawsuits in the U.S. District Court and the Superior Court that the U.S. District Court did not apply—the correct standard in balancing the factors necessary to decide which Court was the better choice for judicial economy. The Court decided to apply the test normally used for a parallel state court proceeding, although acknowledging that the Superior Court is a Congressionally created court and thus "federal" in its creation. This ruling, however, has nothing to do with the Congressional intent when it passed the Tucker Act, so that this case does not support the view of the D.C. Circuit that jurisdiction should vest with them.

The other case upon which the D.C. Circuit relied is the case of *JMM Corporation v. D.C.*, 378 F.3d 1117 (2004) where the D.C. Circuit decided to apply the *Younger v. Harris*, 401 U.S. 37 (1971) abstention doctrine to the District of Columbia, a ruling the Court made clear it had been intentionally avoiding on previous occasions. In that

case, the lower Court ruled that the D.C. Courts are entitled to the same respect that the federal courts accord those of the state courts because all issues can be raised and ultimately ruled upon by this Court. The D.C. Circuit noted that the two purposes of the abstention doctrine were concerns for comity and for federalism. The Court explicitly recognized, relying on the *Handy* case, supra, the Superior Court is a congressionally created court and thus "federal" in its creation. See *JMM Corporation,* supra op. *1122.* The D.C. Circuit went on to decide that the "comity" considerations alone provide the justification for applying the abstention doctrine to the District of Columbia, because there are no concerns about federalism. The lower Court's reliance on this case seems misplaced because it seems to be just the kind of inferences from loose language that the *Hohri* case, supra, deplored.

The Federal Circuit has no easy way to protect its jurisdiction, at least with regard to the instant case. Neither does the U.S. Court of Federal Claims. Only this Court can do so in the context of this case. This Court should accept the petition to clear up this invidious snatch of jurisdiction where it does not belong to uphold the Congressional intent with regards to jurisdiction. The language of the Tucker Act and the Little Tucker Act do not include any exceptions for Article I courts from the District of Columbia, and none should be read in. If the Congress does not agree with this Court's interpretation of Congressional intent, Congress always has the prerogative to pass new legislation and to clear up its intent. In the interim, the jurisdictional intent of Congress should be strictly construed so that the Circuits do not compete among themselves to decide cases and to maintain the orderliness of the appellate process.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION OF THE D.C. CIRCUIT IS AT ODDS WITH THE DECISION OF THIS COURT IN *CHENG FAN KWOK V.U.S.*, 392 U.S. 206 (1968), SETTING THE STANDARD; JURISDICTIONAL STATUTES ARE TO BE CONSTRUED WITH PRECISION AND WITH FIDELITY TO THE TERMS BY WHICH CONGRESS HAS EXPRESSED ITS WISHES, 392 U.S. 206, 212 (1968).

The lower court did not follow the *Cheng Fan Kwok,* supra, standard, but looked to other unnamed statutes which treat the D.C. Courts like a state for some purposes. The fact that Congress has, on some occasions, expressed its opinion that the D.C. Courts should be treated as a state for some purposes does not mean that Congress intended that the D.C. Courts (Superior and D.C. Court of Appeals) should be treated as state courts for all purposes. If they wanted to say that, they are perfectly capable of passing express legislation on that exact subject. Petitioners submit that the Court's unspecified reliance on the expressions of Congress in other circumstances and for other purposes does not meet the standard of construing the statute with the precision and fidelity that *Cheng Fan Kwok,* 392 U.S. 206 (1968) requires. If Congress intended to treat any territorial courts as anything other than Article I Courts, Congress has the ability to say so. Congress has not said so up to now. Other Article I Courts, such as the Tax Court and the Immigration Court, are unquestionably Article I Courts and are part of the United States. If, at any time, Congress

wished to express a different opinion, Congress can pass an amendment to the Tucker Act and state it. Until that time, Courts are under the mandate to follow the *Cheng Fan Kwok* case, supra, and construe the Tucker Act with precision and with fidelity, which it has not done in the instant case. This Court should grant certiorari to uphold the current validity of *Cheng Fan Kwok, supra.*

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THERE EXISTS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER THE TUCKER ACT APPLIES WHEN NAMED OFFICIALS ARE SUED IN THEIR OFFICIAL CAPACITIES OR WHETHER THE AGENCY MUST BE SUED IN ORDER TO INVOKE TUCKER APPLICABILITY.

The D.C. Circuit has ruled in this case that the Tucker Act did not apply since the Petitioners sued the judges of the family court, albeit in their official capacities (as well as their personal capacities) instead of suing the Court as an "agency." The Federal Circuit has no problem in considering cases under the Tucker Act which name the head of an agency instead of naming the agency directly. See, e.g. *Smith* v. *Secretary of the Air Force, Verne Orr,* 855 F.2d 1544 (Fed. Cir., 1988); *Waters* v. *Donald H. Rumsfeld, Secretary, US. Department of Defense, et al.,* 320 F.3d 265 (D.C. 2003). The U.S. Supreme Court should resolve this controversy over whether the naming of officials of a federal agency takes the case out of Tucker Act

consideration because the named officials are not the same as the "United States." Suits are frequently titled in the name of persons instead of an agency so that service of process and responsibility for answering a suit is clear. This Court should clarify this very important issue so that litigants in different circuits are not held to different standards and so that the public can know the requirements ahead of time instead of being surprised by such a relatively small detail.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THERE EXISTS A CONFLICT BETWEEN THE CIRCUITS AS TO WHAT APPROACH TO TAKE TO DETERMINE WHETHER AN AGENCY LOCATED IN THE DISTRICT OF COLUMBIA IS A DISTRICT AGENCY OR A FEDERAL AGENCY. IN *O'TOOLE V. UNITED STATES, 206* F.2d *912* (3rd Cir. 1953), THE THIRD CIRCUIT TOOK AN "ANALYTICAL"APPROACH TO DETERMINE WHETHER A D.C. AGENCY WAS FEDERAL OR D.C. THE D.C. CIRCUIT IN THE. INSTANT CASE LOOKED TO WHETHER FEDERAL COURTS 'GENERALLY "TREAT" THE AGENCY, IN THIS CASE THE D.C. COURTS, AS IF IT WERE A LOCAL AGENCY INSTEAD OF A FEDERAL ONE.

The Third Circuit in *O'Toole v. United States,* 206 F.2d 912 (3rd Cir., 1953) considered carefully how to decide whether the D.C. National Guard was a Federal

Agency or a D.C. Agency, and concomitantly, whether a particular Guard, who drove negligently while on official duty, while driving a U.S. owned M-4, was an employee of the United States or of the District of Columbia. The Third Circuit took a functional approach, analyzing who supervised the D.C. National Guard and who exercised direct control. The Third Circuit rested itsanalysis upon the degree of control and supervision exercised over the District Guard in peacetime by federal authorities. The method used by the District of Columbia Circuit, significantly, does not depend at all on the intent of Congress. It depends upon some general interpretations of the D.C. Circuit previously when adjudging other matters than the Tucker Act.

Using that type of analysis in the instant case, it is clear that that test would show that the entire D.C. Court system is completely controlled by Congress and that the citizens and elected officials of the District of Columbia have absolutely no control whatsoever in the D.C. Court system. Superior Court judges are appointed by the President of the United States. D.C. Code § 11-1501. Superior Court judges appeal their removal to a panel of judges set up by the U.S. Supreme Court. D.C. Code § 11-1529. D.C. judges must follow the law as Congress sets it out. The paychecks of the Superior Court and D. C. Court of Appeals judges come from the U.S. Government. The personnel supporting the judges are not D. C. Government employees but are hired by the Court through an independent Commission as appointed mostly by the President. D.C. Code §§ 11-1522 and 11-1525. The population of the District of Columbia, either through our elected officials or otherwise, has no control over the D.C. Court system, D.C. Code §1-206.02 and no control over the appointment of judges. D.C. Code §11-1501. In that regard, we remain completely disenfranchised in the operation of our Courts.

In *Goddard v. District of Columbia Redevelopment Land Agency, 287* F.2d 343 (D.C. Cir., 1961), even the D.C. Circuit ruled that the D.C.R.L.A. was a federal agency, despite its name and its limited area of operation, within the meaning of the governing statute, 28 U.S.C. §2671. Like the courts of the District of Columbia, the D.C.L.R.A. received direct appropriations from Congress. Also in *Settles v. United States Parole Commission,* 429 F.3d 1098 (D.C. Cir., 2005) the D.C. Circuit held that the U.S. Parole Commission did not become a "mere organ of the District of Columbia" merely because the federal Revitalization Act gave it jurisdiction over D.C. Code offenders. It remained an arm of the federal Government and did not lose its immunity under 42 U.S.C. §1983.

The statements of the D.C. Circuit in the instant case that the D.C. Courts are state-like are a complete fiction. There are specialized statutes that describe them for some purposes as state-like to bring certain countrywide legislation to the District of Columbia in a sort of shorthand method of describing that legislation. However, if the Congress had intended to put the D.C. Courts out of the purview of the Tucker Act for the purpose of describing what Court to appeal constitutional matters involving the D.C. Courts as a defendant, Congress was capable of so stating. They did not make any such provisions. The functional approach of the Third Circuit is the better test for this kind of measurement, and the differing approaches of how to resolve what is a D.C. agency and what is a Federal Agency should be resolved by this Court. This Court should uphold the integrity of the Tucker Act and the exclusive jurisdiction that it placed in the Federal Circuit for a variety of matters unless and until the U.S. Congress passes alternative legislation expressing a different intention.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the United States Court of Appeals for the D.C. Circuit for lack of jurisdiction and should remand the case back to the District Court for the District of Columbia to vacate its opinion.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 9, 2006 Decided June 9, 2006

No. 05-7060

PAMELA H. ROTH, ET AL

APPELLEES.,

v.

RUFUS G. KING, III,
AS CHIEF JUDGE OF THE
SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA ET AL.,
APPELLANTS

HERB ROBINSON,
AS DIRECTOR OF THE OFFICE
ADMINISTRATION FOR THE CRIMINAL JUSTICE
ACT., ET AL.,
APPELLEES

Consolidated
with 05-7061, et al.

Appeals from the United States District Court for the
District of Columbia
(No. 03cv01109)

Donald B. Verelli, Jr, argued the cause for appellants/cross- appellees Rufus G. King, III, et al. With him on the briefs was *Robin M. Meriweather.*

Donald T. Stepka argued the cause for appellants/cross-appellees Herb Robinson, et al. With him on the briefs were *Ronald A. Schechter* and *Jonathan L. Stern.*

Lois R. Goodman argued the cause for appellees/cross-appellants. With her on the briefs were *David J. Ontell, David J. Sitomer,* and *Betty J. Clark.*

Before: SENTELLE and BROWN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge:* In the 2002 Appropriations Act for the District of Columbia, a joint congressional committee issued a statement "strongly urging the D.C. Superior Court to evaluate the quality of the legal services rendered by lawyers appointed under the Criminal Justice Act to handle juvenile delinquency cases." 147 CONG. REC. H8926 (daily ed. Dec. 5, 2001). The court was "urged to take immediate, affirmative steps to ensure that lawyers who lack the requisite training, experience and skill are not appointed to delinquency cases." *Id.* Responding to that directive, Chief Judge Rufus G. .King, III, of the Superior Court of the District of Columbia ("Superior Court"), appointed an *ad hoc* committee to recommend panels of qualified attorneys to represent indigent parties in Family Court.

From among the 351 applications received, the committee ultimately recommended 75 attorneys for a juvenile delinquency panel, 77 attorneys for a guardian *ad litem* panel, 181 attorneys for the Counsel for Child Abuse and Neglect ("CCAN") panel, and 34 special education advocates. On March 26, 2003, after reviewing the committee's report, Chief Judge King issued Administrative Order 03-11 ("A0 03-I11"),which established the Family Court Attorney Panels in accordance with the committee's recommendations.

Prior to the establishment of the Family Court Attorney Panels, the Superior Court did not designate attorneys for such panels. Rather the Court simply appointed counsel from lists of volunteers that had been maintained by the CCAN Office or the D.C. Public Defender Service ("PDS"). Any lawyer who desired to be on the volunteer lists was included, without any inquiry into the lawyer's qualifications. Lawyers on the lists were not guaranteed any appointments, however. Inclusion merely indicated to Superior Court judges that a lawyer was interested in receiving appointments. This regime was changed with the issuance of A0 03-11. The order provided, *inter alia,* that, in most cases, judges in Family Court must appoint attorneys from the appropriate panel list to represent indigent parties. Non-Panel attorneys may continue to represent their clients, but they are not eligible to receive compensation under the Criminal Justice Act ("CJA"): D.C. CODE, §§ 11-2601 *et seq.* (2001), or the CCAN statute, D.C. CODE § 16-2326.01.

On May 21, 2003, plaintiffs-appellees, who claim to represent a class of attorneys who allegedly suffered

harm as a result of A0 03-11, filed suit in District Court against the judges of the Superior Court who participated in developing and implementing the panel system ("Superior Court appellants"), and also against Ronald S. Sullivan, Jr., then-Director of PDS, and Herbert C. Robinson, Chief of PDS's Defender Services Office (collectively "PDS appellants"). Appellees alleged, ***inter alia,*** that they had a "property interest" in their "specialty practice" in Family Court, and that AO03-11 violated their Fifth Amendment rights by "taking" their property without due process.

The Superior Court and PDS appellants filed motions to dismiss on several grounds, including immunity from suit and appellees' failure to allege a constitutionally protected property interest. The District Court granted the motion as to appellees' claims for money damages. ***Roth v. King,*** CA No. 03-1109, Mem. Op. (D.D.C. Mar. 11, 2005), Joint Appendix ("J.A.") 79. The District Court declined to dismiss appellees' claims for injunctive and declaratory relief, however, because, ***inter alia,*** in the court's view, it was unclear "whether the plaintiffs have a property interest in their specialty practice of law." Id. at 17, J.A. 95.

On April 11 and 19, 2005, Superior Court and PDS appellants, respectively, filed appeals seeking collateral order review of the District Court's denial of immunity with respect to appellees' claims for injunctive relief. They also filed motions for certificates of appealability pursuant to 28 U.S.C. § 1292(b) (2000) to seek review of the District Court's order denying their motions to dismiss appellees' Fifth Amendment claims and to stay all proceedings. The District Court granted these motions on April 21, 2005, and this court granted the petitions to appeal on July 29, 2005. Meanwhile, on April 25, 2005, appellees filed a "cross-appeal" seeking

to challenge the District Court's dismissal of their claims for damages. Appellees did not move for a certificate of appealability on these claims, nor did they file a cross-petition under Federal Rule of Appellate Procedure 5(b)(2).

We agree with appellants that the District Court erred in failing to dismiss appellees' Fifth Amendment claims. We hold that appellees have no "property interest" in their "specialty practice" in the Family Court, and that A0 03-11 resulted in no unlawful "takings." We also hold that the District Court erred in finding that judicial immunity covers only damages. Finally, we decline to reach the additional issues purportedly raised by appellees on "cross-appeal," because those matters are not properly before this court.

A. Family Court Appointed Counsel

D.C. Code §§ 16-2301 *et seq.* (2001), which regulates the Family Court Division of the Superior Court, guarantees appointed counsel to parties who cannot afford adequate representation. Section 16-2304(a) gives "[a] child alleged to be delinquent or in need of supervision" the right to counsel "at all critical stages of [Family Court] proceedings," and guarantees that, "[i]f the child and his parent, guardian, or custodian are financially unable to obtain adequate representation, the child shall be entitled to have counsel appointed for him in accordance with rules established by the Superior Court." D.C. CODE § 16-2304(a). These provisions work in tandem with the CJA, which reaffirms the right of juveniles who are alleged to be delinquent or in need of supervision to counsel. Section I I- 2604 of the CJA establishes the hourly rates for attorneys in juvenile cases, and § 16-2326.01 provides that attorneys serving

as counsel or guardians *ad litem* in neglect proceedings are compensated at the same rate. Of particular importance to this case, the CJA also specifies that "[c]ounsel furnishing representation shall in every case be selected from panels of attorneys designated and approved by the courts." D.C. CODE § 1 1-2602.

As noted above, prior to the establishment of the Family Court attorney panel system at issue, Superior Court judges appointed counsel in Family Court matters from lists of volunteers maintained by the CCAN Office or PDS. Attorneys are allowed to add their names to these lists without any inquiry into their qualifications. Inclusion on the lists did not guarantee appointments, however. Rather, it merely indicated that a lawyer was interested in being considered for appointment.

On April 26, 2002, Chief Judge King issued Administrative Order 02-15, creating the Family Court Panels Committee ("Committee") "for the purpose of creating panels of attorneys for representation of indigents in Family Court proceedings." Administrative Order No. 02-15, Superior Court of D.C. (Apr. 26, 2002), at 3, J.A. 120. The order instructed the Committee, in consultation with the presiding and deputy presiding judges of the Family Court, to recommend panels of designated and approved attorneys to represent four categories of indigent parties: (I) juveniles alleged to be delinquent or in need of supervision, (2) minor children needing guardians *ad litem* in neglect and termination proceedings, (3) parents and caretakers in neglect and termination proceedings, and (4) children needing special education advocates. This order was issued in part in response to a call by a joint congressional committee for the Superior Court to

"'evaluate the quality of the legal services rendered by lawyers appointed under the Criminal Justice Act to handle juvenile delinquency cases...[and] to take immediate, affirmative steps to ensure that lawyers who lack the requisite training, experience and skill are not appointed to delinquency cases.'" Administrative Order 03-11, Superior Court of D.C. (Mar. 26, 2003), at 1 (quoting 147 CONG.REC. H8926 (daily ed. Dec. 5, 2001)), J.A. 101.

The Committee initiated an application process on July 18, 2002, and interested attorneys were directed to submit their applications by October 1, 2002 (later extended to November 1, 2002). The application form required applicants to detail, *inter alia*, their educational background, previous experience in Family Court, current caseload, methods of client management, whether they had recently attended legal education programs, and other information about their professional background and experience. *See* Report of the Family Court Panels Committee (Mar. 20, 2003), at 5-6, J.A. 126-27 ("Committee Report"). After applications were received, all active, senior, andmagistrate judges of the Superior Court were asked to evaluate each applicant with whom they were familiar.

The Committee held its selection meetings in February and March 2003. After reviewing all of the applications and accompanying evaluations, the Committee then formulated its recommendations. Any attorney who was deemed qualified was placed on an appropriate Family Court Attorney Panel list. There was no limit on the number of attorneys who could be deemed qualified, and there was no limit on the number of panels on which an attorney might be listed. From the 351 applications received, the Committee ultimately

selected 75 attorneys for the juvenile delinquency panel, 77 attorneys for the guardians *ad litem* panel, 181 attorneys for the CCAN panel, and 34 special education advocates. The Committee Report explained:

> Some attorneys were excluded from a panel because their work . . . was found to be deficient. Others, however, were excluded, particularly from the [guardians ad litem] panel, because they lacked sufficient experience, because judicial officers had insufficient information about the quality of their work, or because they had not previously demonstrated a commitment to the work of the panel to which they applied. Many of these applicants may be outstanding additions to the panels in the future if they obtain appropriate experience and/or training.

Id at 9, J.A. 130.

On March 26, 2003, after reviewing the Committee Report, Chief Judge King issued A0 03-11, which established the Family Court Attorney Panels in accordance with the Committee's recommendations. The order provided that, barring "exceptional circumstances," if an attorney is seeking compensation under either the CJA or the Child Abuse and Neglect Act, Superior Court judicial officers may only appoint that individual if he or she is listed on the appropriate panel. In addition, A0 03-11 mandated that all non qualifying CCAN- compensated guardians ***ad litem*** in current neglect and termination of parental rights cases should be replaced with panel attorneys within six months, unless the presiding judge determines in his or her discretion that substitution would not be in the best interest of the child.

B. District Court Proceedings

On May 21, 2003, appellees filed their initial complaint, along with a motion for a temporary restraining order ("TRO") seeking to enjoin appellants from applying A0 03-11. After the District Court denied appellees' TRO request on June 2, 2003, they filed an amended complaint, which was amended a second time on April 30, 2004. In their Second Amended Complaint, appellees defined the putative plaintiff class as "court-appointed attorneys who have represented in the past three years, are representing, or are otherwise eligible to represent clients in the Family Court of the District of Columbia." Second Am. Complaint. ¶ 33, J.A. 54. Appellees' complaint challenged the Superior Court's panel system principally on the ground that it abridges their purported constitutional right to receive paid Family Court appointments. Specifically, appellees alleged that they have a "property interest in their existing practice before [the] Family Court," and that the panel system violates the Fifth Amendment by "taking" this "property without due process." Id. at Count I, ¶ 113, J.A. 60, 74. Among the 16 counts listed in their complaint, appellees also raised an array of constitutional, statutory, and common law challenges. The complaint seeks monetary damages as well as injunctive and declaratory relief.

On June 1, 2004, appellants filed motions to dismiss all of appellees' claims pursuant to Federal Rules of Civil Procedure 12(b)(l) and (b)(6). In their motions for dismissal, both Superior Court and PDS appellants asserted, *inter **alia,*** that they were immune from liability as a result of their roles in creating the four panels, and moreover, that appellees' Fifth Amendment Takings Due Process claims failed to state a cause of action. The

District Court granted in part and denied in part these motions to dismiss on March 11, 2005.

The District Court found that "the creation of the panel system and the limitation of appointments to panel attorneys was a legislative act," Mem. Op. at 7, J.A. 85, making those appellants who helped establish the Family Court panel framework legislatively immune from all forms of relief. The court found that appellants who participated in the selection of various attorneys for panel membership were entitled to a more limited "judicial" immunity, which the District Court found to bar damages, but not injunctive or declaratory relief. *Id.* at 9, J.A. 87. The District Court also determined that this judicial immunity covered PDS appellants, because their "'duties are related to the judicial process.'" *Id.* at 17, J.A. 95 (quoting *Barr* v. *Mateo*, 360 U.S. 564, 569 (1959)).

The District Court expressed confusion over the odd construction of appellees' complaint alleging a "Fifth Amendment taking of property without due process." *Id.* at 10, J.A. 88. Nonetheless, relying principally on *Family Division Trial Lawyers Ass'n v Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), the District Court concluded that, "[at this point in the litigation, the court cannot say that the plaintiffs do not have a property interest in a specialty practice of law in the Family Division." Mem. Op. at 12, J.A. 90.

Near the conclusion of its Memorandum Opinion granting in part and denying in part appellants' motion to dismiss, the District Court disposed of two arguments raised by appellees challenging the efficacy of the Superior Court Family Court Attorney Panels. The court first held that the panel system was not *ultra vires*. On

this point, the court found that D.C. Code §§11-2602 and 16-2304(a) combine to give the Superior Court authority "to make rules governing the appointment of counsel." Mem. Op. at 14-15, J.A. 92-93. The court then rejected appellees' claim that AO 03-11 unconstitutionally interfered with the attorney-client relationship, noting that appellees had "presented no persuasive authority or argument that an *attorney* has a right to maintain a relationship with a client and that a court may not interfere with that right." *Id* at 16, J.A. 94 (emphasis added).

On April 11 and 19, 2005, Superior Court and PDS appellants, respectively, filed motions for certification under 28 U.S.C. § 1292(b) to appeal the District Court's denial of their motions to dismiss Appellees' Fifth Amendment claims. Appellants also filed timely notices of appeal to seek collateral order review of the District Court's denial of immunity with respect to Appellees' claims for injunctive relief. On April 21, 2005, the District Court granted appellants' motions for certification, and on July 29, 2005, this Court granted appellants permission to appeal pursuant to 28 U.S.C. § 1292(b). Appellees' filed a "cross-appeal" on April 25, 2005, challenging the District Court's ruling that appellants were immune from damages. Appellees never sought certification under 28 U.S.C. § 1292(b) to seek review of the District Court's partial grant of appellants' motion to dismiss affording appellants legislative and judicial immunity against Appellees' claims for damages. Nor did appellees file a cross-petition under Federal Rule of Appellate Procedure 5(b)(2) to appellants' petitions for permission to appeal the District Court's denial of their motion to dismiss Appellees' Fifth Amendment claims.

II. ANALYSIS

A. Jurisdiction

The District Court had jurisdiction over appellees' Fifth Amendment claims pursuant to 28 U.S.C. § 1331 (2000). This court accepted jurisdiction pursuant to 28 U.S.C. § 1292(b) to allow an interlocutory appeal of the District Court's refusal to dismiss appellees' Fifth Amendment claims. And this court has jurisdiction under the collateral order doctrine to review the District Court's denial of appellants' immunity claims, because those claims turn on issues of law. *See Int'l Action Ctr. v. United States,* 365 F.3d 20, 23 (D.C. Cir. 2004) (explaining the "collateral order doctrine" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), with respect to interlocutory appeals from denials of immunity).

On January 9, 2006, instead of filing a reply brief, appellees filed a "motion to remand the case back to the district court due to lack of jurisdiction." Unconsented Mot. to Remand the Case Back to the District Court Due to Lack of Jurisdiction ("Remand Mot.") at 1. In support of this motion, appellees asserted that their complaint sought a monetary claim against the Superior Court, which appellees contend is a *federal court* because Congress created it pursuant to its Article I powers. *See id.* at 1-2. Appellees therefore claimed that the Federal Circuit has exclusive jurisdiction over this appeal. *See id* at 1 (citing 28 U.S.C. § 1295(a)(2) (2000)). Appellees also argued that the District Court's jurisdiction was "questionable," because appellees have not clearly waived their claims to damages in excess of $10,000 and, therefore, the Court of Federal Claims might have exclusive original jurisdiction over their claims. *See id.*

at 2 (citing 28 U.S.C. § 1346). Accordingly, appellees requested that this case be remanded to the District Court, so that it could vacate its judgment and transfer the case to the Court of Federal Claims or, in the alternative, permit appellees to amend their claims to specify that they are not seeking damages in excess of $10,000. *See id.* at 2. The motion to remand was referred to this merits panel. We now deny the motion.

Appellees' jurisdictional arguments are founded on faulty premises. Section 1295(a)(2) provides that the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court "if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title." 28 U.S.C. § 1295(a)(2). Section 1346 delineates trial court jurisdiction in cases where money damages are sought from the United States. See 28 U.S.C. § 1346. In particular, § 1346 provides in pertinent part that the district courts shall have original jurisdiction, concurrent with the Court of Federal Claims, of "[a]ny ... civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress....or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2). Appellees believe that § 1346 applies here, because they are seeking monetary damages from the Superior Court, which they argue should be treated as the United States. This claim is meritless.

Although the Superior Court is a "federal" creation, the "case law and other federal statutes [generally] treat the D.C. courts like state courts." *Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 351 n.5 (D.C. Cir. 2003); *see also* JMM *Corp. v. District of Columbia*, 378 F.3d 1117, 1125 (D.C. Cir. 2004) ("Congress has

made clear that it intends federal courts generally to treat the District of Columbia judicial system as if it were a state system, an intent that this circuit has long respected and effectuated."). We can find no authority, and appellees cite none, supporting the suggestion that, although it is "like state courts" for most purposes, the Superior Court should be treated as the "United States" for purposes of 28 U.S.C. § 1346. We therefore reject the suggestion. And because appellees' complaint plainly is not a suit against the United States, there is no merit to their suggestion that the Court of Federal Claims has exclusive original jurisdiction because appellees did not expressly waive damages in excess of $10,000.

It is also clear that the judges of the Superior Court and officials at PDS are not the "United States" for purposes of the Tucker Act. *See* 28 U.S.C. § 1491(a)(l) (2000) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . ."). Indeed, the "Tucker Act grants the Court of Federal Claims jurisdiction over suits against the United States, *not* against individual federal officials. 28 U.S.C. § 1491(a)." *Brown* v. *United States,* 105 F.3d 621,624 (Fed. Cir. 1997) (emphasis added).

In short, as noted above, the District Court had jurisdiction under § 1331 to hear appellees' Fifth Amendment claims, and this court has jurisdiction under § 1292(b) and the collateral order doctrine to entertain the appeals that are now properly before us.

B. The Issues on Appeal

This case is laden with multiple claims and a convoluted record. It is therefore important that we carefully draw the bounds of this interlocutory appeal, lest there be any confusion over what is now before this court. There are only two issues now on appeal: (1) appellants' claim that the District Court erred in denying their motion to dismiss appellees' Fifth Amendment claims; and (2) appellants' claim that the District Court erred in concluding that they were not entitled to immunity against appellees' claims for injunctive relief. There are no other issues before this court at this time.

Appellees purported to file a "cross-appeal" challenging the District Court's ruling that appellants were "immune from suit and liability on plaintiffs' claims." See Notice of Cross-Appeal, *Roth v. King,* CA No. 03-1109 (D.D.C. Apr. 25, 2005). Principally, appellees seek to give life to their claims for damages against appellants, which the District Court dismissed as barred by legislative and judicial immunity. But the District Court dismissal of these claims did not result in a "final decision" for purposes of 28 U.S.C. § 1291, *see Hill v. Henderson,* 195 F.3d 671, 672 (D.C. Cir. 1999), and appellees did not seek certification under 28 U.S.C. § 1292(b). Nor do appellees satisfy the requirements of the collateral order doctrine. We agree with our sister circuits, which have uniformly held that an order *granting* immunity "does not satisfy the collateral order doctrine and may not be immediately appealed." *Baird v. Palmer,* 114 F.3d 39, 43 (4th Cir. 1997) (citing cases). It is also noteworthy that the District Court did not certify its dismissal as final under Federal Rule of Civil Procedure 54(b). *See Hill,* 195 F.3d at 672.

Moreover, appellees did not file a cross-petition for

permission to appeal after Superior Court appellants sought permission to appeal the District Court's refusal to dismiss appellees' Fifth Amendment claims. *See* FED. R. APP. P. 5(b)(2) (stating that "[a] party may file. . .a cross-petition within 7 days after the [initial] petition is served"). In light of appellees' failure to timely file this cross-petition - or any at all, for that matter - it is unclear whether we even have discretion to consider the issues presented by appellees' "cross-appeal."

In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), t he Court noted:

> As the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court. The court of appeals may not reach beyond the certified order to address other orders made in the case. *United States v. Stanley*, 483 U.S. 669, 677 (1987). But the appellate court may address any issue fairly included within the certified order because "it is the order that is appealable, and not the controlling question identified by the district court." 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.25[1], p. 300 (2d ed.1995). See also 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3929, pp. 144-145 (1977) ("[The court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question.").

Id. at 205. Although *Yamaha* makes it clear that we

"may address any issue fairly included within the certified order," it does not address how § 1292(b) should be read in conjunction with Rule 5(b)(2) of the Federal Rules of Appellate Procedure. Appellees' challenge to the District Court's order dismissing their damage actions as barred by legislative and judicial immunity arises from the same order denying appellants' motion to dismiss appellees' Fifth Amendment claims. It therefore "applies to the order certified" for review under §1292(b)(2). But the challenge also appears to be a cross-petition within the compass of Rule 5, which must be timely filed: and for which permission to seek review must be given. Even if appellees' "Notice of Cross-Appeal" is viewed as a "cross-petition," we did not grant permission for such an appeal, and appellees' Notice of Cross-Appeal was filed 14 days after Superior Court appellants' petition was served on the clerk of the District Court. At least one other circuit has maintained that "[t]he failure to file [a] petition for permission to cross-appeal within the time provided is a jurisdictional defect, *barring* th[e] Court from hearing [appellee's cross-appeal." *Tranello v. Frey,* 962 F.2d 244,247-48 (2d Cir. 1992) (emphasis added). But *cf. Freeman B & B Assocs.,* 790 F.2d 145, 151 (D.C. Cir. 1986) (holding that failure of an appellee to cross-appeal "ordinarily precludes review where an appellee seeks to enlarge his rights or lessen those of an adversary," but is not a jurisdictional bar).

We need not resolve these knotty issues raised in connection with § 1292(b) and Rule 5. The one thing that is clear here is that any review of appellees' purported cross-appeal is at most discretionary with this court. Given the record at hand, we decline to exercise any discretion that we might have to engage in interlocutory review of the District Court's order

denying appellees' claims for damages. As appellants point out, appellees "have not even argued, let alone shown, that these claims warrant interlocutory review." Reply & Opp'n Br. of Appellants Superior Court Judges at 15. Absent such a showing, there is no good reason for this court to entertain appellees' cross-appeal on damages. Moreover, we similarly decline to resolve whether the cross-appeal is so "inextricably intertwined as to allow for pendent appellant jurisdiction in this case. *See Swint v. Chambers County Comm 'n,* 514 U.S. 35,50- 51 (I 995); *Gilda Marx, Inc. v. Wildwood Exercise, Inc.,* 85 F.3d 675, 678-79,679 n.4 (D.C. Cir. 1996) (per curiam).

We therefore turn to the two issues that are properly before this court: (1) appellees' Fifth Amendment claims and (2) appellants' claims that they are entitled to immunity against injunctive relief.

C. Appellees' Fifth Amendment Claims

This court reviews *de novo* the District Court's denial of appellants' motions to dismiss appellees' Fifth Amendment claims. *See Covad Commc'ns Co. v. Bell Atl. Corp.,* 398 F.3d 666, 670-71 (D.C. Cir. 2005); *Bombardier Corp. v.. Nat'l R.R. Passenger Corp.,* 333 F.3d 250, 252 (D.C. Cir. 2003). In concluding that appellees "may be able to demonstrate that they have a property interest in their specialty practice of family law," Mem. Op. at 13, J.A. 91, the District Court relied primarily on *Family Division Trial Lawyers Ass'n v. Moultrie. Id.* at 12-13: J.A. 90-91. We find that the District Court erred in reaching this conclusion, for *Moultrie* plainly does not control the disposition of this case. We also hold that appellees' Fifth Amendment claims fail to state a cause of action and, therefore, must be dismissed.

The court in Moultrie considered a constitutional claim brought by Superior Court Family Division trial attorneys "that requiring an attorney to perform traditional *pro bono* service amounts to a 'taking' of property." Moultrie, 725 F.2d at 705. In the course of the opinion, the court said: "if the superior court appointment system effectively denies the appellants the opportunity to maintain a remunerative practice as family lawyers before the Family Division, and that specialty practice is determined to be a 'property' interest, it might effect an unconstitutional 'taking.'" *Id.* at 706. Appellees' attempt to rest on this passage from *Moultrie* to build a claim here that they have a "property interest" in their specialty practice" in Family Court, and that A0 03-11 violated their Fifth Amendment rights by "taking" their property without due process. Appellees' arguments on this score are specious.

Not only does *Moultrie* not support appellees' Fifth Amendment claims in this case; parts of the decision positively refute their principal contentions. As a preliminary matter, it should be noted that *Moultrie* addressed an equal protection claim under the Fifth Amendment. Appellees in this case have raised no such claim. More importantly, the court in Moultrie made it absolutely clear that the trial attorneys in the Family Division of Superior Court "[had] no expectation of compensation for their services in appointed cases that rises to the level of a property interest." *Id.*

Finally, and most importantly, the court's concern in Moultrie was not that the attorneys' expectations of compensated appointments might rise to the level of a property interest. Rather, the court was concerned that the system at issue in that case - which required attorneys to accept abuse and neglect cases pro bono in order to receive compensated juvenile cases - might

amount to an unlawful "taking" if the burden of the mandatory pro bono assignments prevented lawyers from earning a living. The court thus said:

> While we agree . . .that some *pro bono* requirements do not constitute a "taking," we think it equally clear that an unreasonable amount of required uncompensated service might so qualify.
>
> ....
>
> Of course, the state, in the reasonable exercise of its police power, may frustrate even expectations that rise to the level of a property interest. But that is not what is involved here. Here....the government is not merely contracting for employees' services which it is free to use or to decline, but rather is *allegedly appropriating for itself in the existing market the services of certain lawyers to a degree that their economic survival in that market is threatened....*

Id. at 705: 706 n. 13 (internal citations omitted) (emphasis added).

It seems obvious that nothing about the Family Court attorney panel system promulgated pursuant to A0 03-11 resembles the "conscripted" *pro bono* service requirement at issue in *Moultrie.* Appellants are quite correct in their argument that "[the instant case simply does not implicate the *Moultrie* 'takings' analysis upon which the Family Lawyers' Fifth Amendment claims depend. The Family Lawyers do not, and cannot, allege that their time or labor has been appropriated." Resp. &

Reply Br. of PDS Appellants at 5. It is also clear that "A0 -03-11 neither expropriates any of [appellees'] labor nor imposes a regulatory burden or restriction on them of any kind." Br. of Superior Court Appellants at 19. In other words, the government is not "appropriating itself . . . the services of certain lawyers." *Moultrie,* 725 F.2d at 706 n.13. Instead, "[t]he Superior Court is merely deciding the rules that will govern how it will retain and compensate lawyers in fulfillment of the government's statutory responsibility to ensure that indigents in Family Court matters receive effective representation." Br. of Superior Court Appellants at 19. In short, *Moultrie* cannot possibly carry the day for appellees.

The only remaining questions here are whether appellees have otherwise alleged a viable "property interest" protected by the Fifth Amendment Due Process Clause or, alternatively, stated a claim that is cognizable under the Takings Clause of the Fifth Amendment. We are not entirely sure what appellees mean when they contend that A0 03-11 constitutes a "Fifth Amendment taking of property without due process." Second Am. Compl. Count 1, J.A. 60. We need not tarry over this point, however. Accepting appellees' allegations as true, we find no valid property interest under either the Due Process Clause or the Takings Clause of the Fifth Amendment. The District Court therefore erred in allowing these claims to survive appellants' motion to dismiss.

It is well understood that, under the Fifth Amendment Due Process clause, "[to have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." *Town of Castle Rock v. Gonzales,* 125

S. Ct. 2796, 2803 (2005) (citation and internal quotation marks omitted). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. Of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972); *see also Bloch v. Powell,* 348 F.3d 1060, 1068 (D.C. Cir. 2003). And "federal constitutional law determines whether [a claimed property] interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Castle Rock,* 125 S. Ct. at 2803-04 (citations, alteration, and quotation marks omitted).

Appellees have cited no source of law creating any entitlement that qualifies as property under the Due Process Clause. There was no statute, regulation, or court rule that guaranteed any member of the bar compensated Family Division appointments before AO 03-11 was promulgated. As noted above, the judges of the Superior Court always had discretion to decide which attorneys to appoint to handle Family Division cases, and to decide the basis upon which such appointments would be made. Section 11-2602 of the D.C. Code provides that "[c]ounsel furnishing representation . ..shall in every case be selected from panels of attorneys designated and approved by the courts." D.C. CODE § 11-2602. Prior to the adoption of AO 03-11, no law or rule ensured appointment for attorneys who met particular criteria, and no law or rule restricted the discretion of a presiding judge to terminate a lawyer's appointment for cause. The Superior Court simply appointed counsel from lists of volunteers that had been maintained by the CCAN Office and PDS. Any lawyer who desired to be on a volunteer list was included, without any inquiry into the lawyer's qualifications. However, inclusion on a list merely

indicated to Superior Court judges that a lawyer was interested in receiving appointments - it did not guarantee appointment. In short, before the issuance of A0 03-11, no member of the bar could claim entitlement to appointments in the Family Division.

"[W]hen a statute leaves a benefit to the discretion of a government official, no protected property interest in that benefit can arise." *Bloch,* 348 F.3d at 1069; *see also Castle Rock,* 125 S. Ct. at 2803 (noting that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion"); *Ky. Dep't of Corr. v. Thompson,*490 U.S. 454, 462-63 (1989) (stating that protected liberty interests are created when a state places substantive limitations on official discretion). This point was made clear in *Washington Legal Clinic for the Homeless v. Barry,* 107 F.3d *32* (D.C. Cir. 1997), where we held that D.C. law and regulations defining eligibility for emergency shelter for homeless persons did not create a property interest, because government officials retained substantial discretion to determine which eligible persons would actually receive shelter. *Id.* at 36-37. "Where....the legislature leaves final determination of which eligible individuals receive benefits to the unfettered discretion of administrators, no constitutionally protected property interest exists." *Id.* at 36 (citation and internal quotation marks omitted).

Under this well-established case law, appellees' desires for compensated appointments amount to nothing more than "expectations," not "entitlements." There never has been a statute or rule, or even a practice, securing to attorneys a right to compensated Family Court appointments. And "[a] lawyer's inability to make a living as a family court practitioner without such appointments does not remotely create an entitlement."

Br. for Superior Court Judge Appellants at 20. Therefore, appellees have alleged no facts sufficient to support any claim under the Due Process Clause.

Appellees' claims under the Fifth Amendment Takings Clause fare no better. As appellants aptly note: "the invalidity of a takings claim follows *a fortiori* from [appellees'] failure to establish any entitlement that would qualify as property under the Due Process Clause. That is so because even a legitimate claim of entitlement to a benefit that is sufficient to trigger due process protection does not transform the benefit itself into a vested property right protected by the Takings Clause. *See generally~ Kizas v.. Webster.* 707 F.2d 524, 539-40 (D.C. Cir. 1983)." Br. of Superior Court Judge Appellants at 16-17. The decision in *Kizas* notes that "the fifth amendment employs two independent clauses to address two independent issues. A claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation." *Id.* at 539 (citation, quotation marks; and alteration omitted).

Furthermore, "[e]ven if the District of Columbia had established an entitlement on the part of [appellees] to compensated Family Division appointments (and it assuredly has not), the Takings Clause would not constrain the government's authority to alter or eliminate that entitlement." Br. of Superior Court Judge Appellants at 17 (citing, *inter alia*, *Bowen* v. *Gilliard,* 483 U.S. 587,604 (1987) ("Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level.")). "Generally, when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and

the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes." *Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm.*, 38 F.3d 603,606 (D.C. Cir. 1994) (per curiam). "[T]he very notion that A0 03-11 'takes' [appellees'] property is beset by such difficulties that it is impossible to see how the concept could apply in practice." Br. of Superior Court Judge Appellants at 17. Appellees have stated no Takings claims that can withstand appellants' motions to dismiss.

In sum, we hold that appellees have not stated a claim for relief under either the Due Process or Takings Clauses of the Fifth Amendment. They have demonstrated no entitlements or "property interests" that warrant mandatory process or just compensation. We therefore reverse the District Court on this point.

D. Immunity

1. *Superior Court Appellants*

We agree with Superior Court appellants that the District Court erred in holding that appellees might be able to obtain injunctive relief. 42 U.S.C. § 1983, as amended in 1996 by the ,Federal Courts Improvement Act, explicitly immunizes judicial officers against suits for injunctive relief. The statute states that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub. L. No. 104-3 17, §309(c), 1 10 Stat. 3847, 3853 (codified as amended at 42 U.S.C. § 1983 (2000)). Neither statutory limitation appears to apply in this case, and appellees' complaint says nothing to the contrary.

Therefore, because a number of the Superior Court appellants acted in a "judicial capacity" in selecting attorneys for inclusion on the panels, those appellants are immune from suits for injunctive relief under § 1983.

Citing *Forrester v. White*, 484 U.S. 219 (I988), appellees argue that the creation of the panels and appointment of attorneys are "administrative" acts with respect to which no immunity should apply. Appellees' reliance on Forrester is misplaced. Forrester concerned a probation officer's complaint that the chief judge of her circuit unlawfully demoted and discharged her. The Supreme Court found that the chief judge "was acting in an administrative capacity when he demoted and discharged [her]." *Id* at 229. The Court held that "[t]hose acts - like many others involved in supervising court employees and overseeing the efficient operation of a court -....were not themselves judicial or adjudicative." *Id* Thus, Forrester stands for the unremarkable proposition that internal employment decisions made by judges are not judicial acts. Such acts have no relevance to the development and implementation of A0 03-11.

2. ***PDS* Appellants**

As the District Court noted, "[b]y statute, PDS is directed to assist the court in determining the financial eligibility for appointed representation." Mem. Op. at 17, J.A. 95. In addition, D.C. Code § 2-1602(b) (2001), requires PDS to "establish and coordinate the operation of an adequate system of private attorneys to represent [indigent] persons." It is well established that judicial immunity "extends to other officers of government whose duties are related to the judicial process." *Barr*, 360 U.S. at 569: *see Stanton* v. *Chase*, 497 A.2d 1066, 1069 (D.C.1985) (citing *Barr* and holding that the

Deputy Chief of the Defender Services Office - then known as the CJA Office of PDS - was absolutely immune from suit for acts associated with appointment of counsel under the CJA). It is beyond question that PDS appellants' statutory role in the panel system is "related to the judicial process," and the District Court therefore properly afforded them judicial immunity. There is also no reason to believe that the Federal Courts Improvement Act of 1996 is restricted to "judges," and thus we find that, due to their statutory role in the selection process, PDS appellants are immune from injunctive relief.

III. CONCLUSION

For the reasons outlined above, we reverse on the two matters that are presently before this court. We hold that the District Court erred in (1) denying appellants' motion to dismiss appellees' Fifth Amendment claims, and (2) in concluding that appellants were not entitled to immunity against appellees' claims for equitable relief. The case is hereby remanded for further proceedings consistent with this decision.

So ordered.

SUPPLEMENTAL APPENDIX

2

Supreme Court, U.S.
FILED
SEP - 7 2006
OFFICE OF THE CLERK

06-833

No._____

IN THE SUPREME COURT
OF THE UNITED STATES

DAVID J. SITOMER, ET AL.,
Petitioners,

v.

RUFUS G. KING, III
AS CHIEF JUDGE OF THE
SUPERIOR COURT OF
THE DISTRICT OF
COLUMBIA, ET AL.,
Respondents.

SUPPLEMENTARY APPENDIX

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SUPPLEMENTARY APPENDIX

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PAMELA ROTH *et al.*,	:	
	:	
Plaintiffs,	:	Civil Action No:
	:	03-1109(RMU)
v.	:	Document No: 2
	:	
The Honorable RUFUS G. KING III, Chief Judge of The Superior Court of the District of Columbia *et al.*,	:	
	:	
Defendants.	:	

MEMORANDUM ORDER

DENYING THE PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

This matter is before the court on the plaintiffs' motion for a temporary restraining order. The plaintiffs ask the court to enjoin the defendants from (1) accepting bids and awarding a contract for guardian ad litem services, (2) preventing certain members of the District of Columbia bar from practicing before the Family Court of the District of Columbia ("Family Court"), and (3) removing attorneys practicing in Family Court from any cases without good cause. Because the plaintiffs have failed to adequately show a likelihood of success on the merits and irreparable harm, the court denies their motion for a temporary restraining order.

I. BACKGROUND

The plaintiffs are court-appointed attorneys who practice neglect and juvenile law in Family Court. Compl. ¶ 19. The defendants include, *inter alia,* Chief Judge Rufus G. King III of the District of Columbia Superior Court ("Superior Court"), numerous other judges from Superior Court, and the Public Defender Service. *Id.* ¶¶ 20-25. The plaintiffs explain that on March 26, 2003, Chief Judge King issued Administrative Order 03-11, creating panels of attorneys eligible for appointments as attorneys for juveniles, parents, children, and special education advocates. *Id.* ¶ 4. Chief Judge King allegedly has authorized judicial officers to remove attorneys who were not selected for the panels from pending cases dealing with juveniles, parents, children and special education advocates. *Id.* ¶ 7. The Superior Court also set a May 27, 2003 deadline for bids in response to the May 9, 2003 solicitation for guardian ad litem services.

The plaintiffs filed a complaint and a motion for a temporary restraining order on May 21, 2003. On the following day, the plaintiffs filed an affidavit in support of the motion. Pursuant to the parties' jointly proposed briefing schedule, the defendants filed responses on May 28, 2003 and the plaintiffs filed a reply on May 29, 2003. The court now addresses the plaintiffs' motion.

II. ANALYSIS

This court may grant injunctive relief only when the movant demonstrates:

> (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable

> injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the

public interest would be furthered by the injunction.

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998)(quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)). It is particularly important for the movant to demonstrate a substantial likelihood of success on the merits. *Cf. Benten v. Kessler*, 505 U.S. 1084, 1085 (1992)(per curiam). Indeed, absent a "substantial indication" of likely success on the merits, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 38 F. Supp. 2d 114, 140 (D.D.C. 1999)(internal quotation omitted).

In this case, the plaintiffs fail to satisfy the first two prongs of the injunctive relief test. First, the plaintiffs fail to demonstrate a likelihood that they will succeed on the merits of this action. Pls.' Mot. at 6; *Am. Bankers Ass'n.*, 38 F. Supp. 2d at 140 (stressing the importance of the success on the merits factor). While the plaintiffs allege that the defendants' actions violate numerous statutes, laws, and the Constitution, they provide no analysis of facts and law demonstrating how the defendants' actions violate these requirements. *See generally* Pls.' Mot.; Pls.' Reply; Sitomer Aff. The plaintiffs also fail to make an adequate showing of imminent irreparable harm. Although they state that the defendants' actions threaten the existence of the plaintiffs' legal practices, the plaintiffs provide no evidence that adequately and specifically supports this

claim. Pls.' Mot. at 6-7; Pls.' Reply at 3-4; Sitomer Aff.; *Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)(requiring evidence of imminent irreparable harm and rejecting bare allegations). In sum, the

plaintiffs have failed to provide the court with factual and legal support for at least two of the four requirements for injunctive relief. *Mova Pharm. Corp.*, 140 F.2d at 1066. Consequently, the court denies the plaintiffs' request for a temporary restraining order. *Am. Bankers Ass'n*, 38 F.Supp. 2d at 140.

Accordingly, it is this 2nd day of June 2003,

ORDERED that the plaintiffs' motion for a temporary restraining order is **DENIED.**

SO ORDERED.

RICARDO M. URBINA
UNITES STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAMELA H. ROTH *et al.*, :

Plaintiffs,	:Civil Action No: 03-
	: 1109(RMU)
V.	:Document Nos.: 42,43
	:
RUFUS KING III, Chief	:
Judge of the Superior Court	:
Of the District of Columbia,	:
et al.,	:
Defendants.	:

MEMORANDUM OPINION

GRANTING IN PART AND DENYING IN PART THE DEFENDANTS' MOTIONS TO DISMISS

I. INTRODUCTION

This case comes before the court on the defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The plaintiffs' alleged causes of action arise from the defendants' implementation of a new panel system ("panel system") for appointing counsel to indigent parties in certain family court cases. First, the plaintiffs assert that the new panel system violates the Fifth Amendment by depriving them of their property right in their specialty family law practices, existing caseloads, future appointments and ability to practice law. The

plaintiffs further contend that their removal from active cases without good cause or consultation with the plaintiffs and their affected clients violates the Fifth Amendment's guarantee of due process as well as Article 1, Section 10 of the Constitution. Finally, the plaintiffs allege that the

defendants tortiously interfered with their prospective economic advantage and contractual relations, defamed and libeled them, and the Competition in Contracts Act. The plaintiffs seek damages, declaratory judgment and injunctive relief. For the reasons that follow, the court grants in part and denies in part the defendants' motion to dismiss.

II. BACKGROUND

A. Factual Background

This case involves two groups of defendants, each of which has filed a motion to dismiss. The first group of defendants are Rufus G. King III, Lee F. Satterfield, Anita Josey-Herring, Ronna Beck, Ramsey Johnson, Anna Blackburn-Rigsby, William Jackson, Robert Morin, Thomas Motley, Hiram Puig-Lugo, Robert Richter, Susan Winfield, Rhonda Reid-Winston, Juliet McKenna and William Nooter. All of these defendants are judicial officers in the Superior Court of the District of Columbia ("Superior Court"). 2nd Am. Compl. ("Compl.") ¶¶ 34-36. Also included in the first group of defendants are defendants Wilma Brier and Reginald Ramdat, who are employees of the Superior Court. *Id.* ¶¶ 37-38. Collectively, the judicial officers and defendants Brier and Ramdat are the "judicial defendants." The second group of defendants are Ronald Sullivan, Director of the Public

Defender Service for the District of Columbia ("PDS")[1], and Herbert Robinson, Chief of the PDS's Defender Services Office (collectively, "PDS defendants"). *Id.* ¶ 37.

Under D.C. law, indigent persons have the right to

[1] Since the filing of this lawsuit, Avis Buchanan has succeeded Ronald Sullivan as Director of the Public Defender Service for the District of Columbia

court-appointed counsel in certain proceedings before the Family Division of the Superior Court of the District of Columbia ("Family Division"). *Id.* ¶ 1. Specifically, D.C. Code § 16-2304(a) provides the right to counsel to children who are alleged to be delinquent or in need of supervision, and § 16-2304(b)(1) provides the right to counsel to indigent children, parents, guardians or custodians in neglect proceedings. D.C. Code §§ 16-2304(a), 16-2304(b)(1). The Criminal Justice Act ("CJA") guarantees representation for alleged juvenile delinquents. D.C. Code § 11-2601(5). In 2002, pursuant to Administrative Order 2-15 ("AO 2-15"), defendant King established the Family Court Panels Committee, which was tasked to create four panels of attorneys from which appointments to juvenile and neglect cases were henceforth to be made.[2] Compl. ¶ 13. The Family Court Panels Committee consisted of defendants Beck, Johnson, Blackburne-Rigsby, Jackson, Morin, Motley, Puig-Lugo, Richter, Winfield, Reid-Winston, McKenna and Nooter. *Id.* ¶ 36.

On March 26, 2003, defendant King issued

Administrative Order 03-11 (AO 03-11), establishing separate panels of attorneys eligible for appointments as attorneys for: (1) juveniles alleged to be delinquent or in need of supervision; (2) parents and other caretakers in neglect and termination proceedings; (3) children needing guardians *ad litem* in neglect and termination proceedings; and (4) children needing special education advocates. *Id.* ¶ 13. Only attorneys named on a panel are eligible for appointment to and government compensation for each type

[2] Prior to Administrative Order 2-15, appointed counsel in each type of case came from a list of volunteers maintained by the Office of Counsel for Child Abuse and Neglect and PDS. Any lawyer who asked to be included was included on the list without inquiry into the attorney's qualifications. Compl. ¶ 5.

of case. *Id.* ¶ 14. A.O. 3-11 further provides that non-panel attorneys, with limited exceptions, should be removed from their cases within six months of the order. *Id.* ¶ 18. In addition to creating the panel system, on May 9, 2003, the Superior Court solicited contracts to provide legal representation as guardians *ad litem* for up to 33% of the cases filed annually in Family Court and to provide guardian *ad litem* training. *Id.* ¶ 29. The deadline for bids was May 27, 2003. *Id.* None of the plaintiffs applied to the solicitation. *Id.*

B. Procedural History

On May 23, 2003, the plaintiffs filed their initial complaint along with a motion for a temporary restraining order. On June 2, 2003, the court denied the motion for a temporary restraining order. The plaintiffs subsequently filed an amended complaint, which was amended a second time. In response, the judicial defendants and the PDS defendants each filed motions to dismiss. The court now turns to those motions.

III. ANALYSIS

A. Legal Standard for a Rule 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of he claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003)(citing FED R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Such simplified notice pleading is made possible by the

liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 511-14 (2002), or "plead law or match facts to every element of a legal theory." *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000)(internal quotation marks and citation omitted).

Accordingly, "the accepted rule in every type of case" is that a court should not dismiss a complaint for failure to state a claim unless the defendant can show beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Warren v. District of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004); *Kingman Park*, 348 F.3d at 1040. Thus, in resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations-including mixed questions of law and fact-as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); *Holy Land Found. for Relief &*

Development v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning*, 292 F.3d at 242. While many well-pleaded complaints are conclusory, the court need not accept as true the inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren*, 353 F.3d at 39; *Browning*, 292 F.3d at 242.

B. Legislative and Judicial Immunity Bars the Plaintiffs' Claims for Damages Against the Judicial Defendants

Counts I-X against the judicial defendants can be

disposed of in one word: immunity. Each of those counts seeks damages on myriad theories, including a Fifth Amendment Taking, tortious interference with economic advantage, tortious interference with contractual relations, violation of the Competition in Contracts Act, and defamation and libel.[3] Compl. ¶¶ 51-85. The defendants assert that judicial immunity precludes the plaintiffs' claims. Judicial Defs.' Mot. to Dismiss ("Judicial Defs.' Mot.") at 28-33; PDS Defs.' Mot. to Dismiss ("PDS Defs..' Mot.") at 9-10. The plaintiffs respond by arguing that the judicial defendants actions were administrative in nature, and thus did not qualify for judicial immunity. Pls.' Opp'n to Judicial Defs.' Mot. to Dismiss ("Pls.' Opp'n to Judicial Defs.' Mot.") at 22. The court concludes that both

legislative and judicial immunity bar the plaintiffs' claims for damages against the judicial defendants.

1. Legislative Immunity

"The principle that legislators are absolutely immune for liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998). Moreover, judicial officers enjoy legislative immunity when they are "acting in their legislative capacity." *Supreme Court of Va [sic] v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734 (1980). This is true because "immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Legislative immunity is not merely immunity from damages, but from actions seeking declaratory and injunctive relief as well.

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[3] The court also notes that the plaintiffs do not state a viable claim under the Competition in Contracting Act ("CICA") because the plaintiffs do not dispute that the CICA regulates procurement by the General Services Administration ("GSA") and they have not alleged any involvement by GSA. Compl. ¶ 84; Pls.' Opp'n to Judicial Defs.' Mot. At 17.

Consumers Union, 446 U.S. at 733. Accordingly, the court must determine whether the judicial defendants were acting in a legislative capacity when they established the panel system.

The authority for the judicial defendants to create the challenged panel system flows from the District of Columbia Code. Pursuant to D.C. Code § 16-2304(a):

> A child alleged to be delinquent or in need of supervision is entitled to be represented by counsel at all critical stages of [Family] Division proceedings....If the child and his parent, guardian, or custodian are financially unable to obtain adequate representation, the child shall be entitled to have counsel appointed for him in accordance with rules established by the Superior Court

D.C. Code §16-2304(a). Similarly, counsel appointed for

alleged juvenile delinquents pursuant to the CJA "shall in every case be selected from panels of attorneys designated and approved by the courts." *Id.* § 11-2602.

Based on the authority granted by the D.C. Code, defendant King promulgated AO 2-15, creating the Family Court Panels Committee and AO 03-11 establishing separate panels for attorneys eligible for appointments as attorneys for juveniles, parents, guardians *ad litem* and special education advocates. As noted, AO 03-11 provides that judicial officers in Family Court must appoint attorneys listed on the appropriate panel, unless no panel attorney is available. Only appointed attorneys may receive payment from government funds and non-panel attorneys were to be replaced with panel attorneys within six months of the promulgation of this order.

A court acts in a legislative capacity when it enacts rules that "act not on parties litigant, but on those who

practice law…[t]hey do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens." *Consumers Union*, 446 U.S. at 731 (internal quotation omitted). In other words, legislation "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908). Based on this guidance from the Supreme Court, the court concludes that the creation of the panel system and the limitation of appointments to panel attorneys was a legislative act. *Id.* (holding that "[t]he establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial"). Accordingly, the judicial defendants enjoy legislative immunity and cannot be held liable for damages. *Consumers Union*, 446 U.S. at 734. Thus, because counts

I-X of the second amended complaint seek damages from the judicial defendants, the court dismisses those counts.

2. Judicial Immunity

The plaintiffs' complaint is vague as to which [sic] the judicial defendants actively participated in the rule-making process that resulted in the creation of the panel system. *See, e.g.*, Compl. ¶ 52 (stating that "Defendants have deprived plaintiffs of the ability to practice [their] specialty practices…by setting up exclusive panels for representation"), ¶ 69 (alleging that "defendants have eliminated plaintiffs [sic] ability to practice in these specialty field(s) of law, by setting up exclusive panels"). However, even if some judicial defendants did not engage in legislative activity, the court concludes that their actions are covered by judicial immunity. The complaint indicates that the judicial defendants selected various attorneys for membership on the GAL, juvenile, CCAN and Special Education Advocates panels. Compl. ¶ 15. All of the

alleged injuries to the plaintiffs stem from the creation of the panel system, the fact that the plaintiffs were not selected for certain panels and their removal from their current cases. *See, e.g., id.* ¶¶ 52, 56, 59, 62, 66, 69, 73, 76, 80, 84.

The plaintiffs simply assert, without citation to any authority, that removal of attorneys from cases is an administrative act. Pls.' Opp'n to Judicial Defs.' Mot. at 22-23. The plaintiffs also appear to argue that the actions of the judicial defendants are not entitled to immunity because AO 03-11 was *ultra vires*.[4] *Id.* The court

disagrees with the plaintiffs on both counts.

"Judges enjoy absolute immunity from suits for money damages for all actions taken in the judge's judicial capacity, unless these actions are taken in the complete absence of all jurisdiction." *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993). As noted, the D.C. Code provides authority to the Superior Court to promulgate rules that govern the appointment of attorneys. D.C. Code §§ 11-2602, 16-2304. In addition, the D.C. Court of Appeals has held that "the appointment of counsel under the CJA is a judicial act." *Stanton v. Chase*, 497 A.2d 1066, 1068 (D.C. 1985). Moreover, courts have long held that the determination of who may practice before the courts is a judicial act. *Sparks v. Character & Fitness Comm. Of Ky.*, 859 F.2d 428, 430 (6th Cir. 1988)(citing *Ex parte Secombe*, 60 U.S. 9, 13 (1856) and *Simons v. Bellinger*, 643 F.2d 774, 780 (D.C. Cir. 1980)). The court concludes that the actions that the judicial defendants are alleged to have taken, that is, creating the panel system, placing some attorneys on panels, not placing some attorneys on panels and removing attorneys from their cases, are all judicial acts. Accordingly, to the extent that any judicial defendant is not entitled to

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[4] The court discusses the plaintiffs' contention that the judicial defendants' actions were *ultra vires* in section III.E.

legislative immunity, he or she is entitled to judicial immunity from damages.

C. The Plaintiffs May be Entitled to Injunctive or Declaratory Relief

Despite the fact that legislative immunity bars suit for all forms of relief, when a judicial officer acts in an enforcement role, he or she may be subject to suit for injunctive or declaration relief. *Forrester v. White*, 484 U.S. 219, 228-29 (1988). This notion is consistent with the view that immunity turns on "the nature of the function

performed, not the identity of the actor that performed it[.]" *Id.* at 229. Here, the plaintiffs allege that the judicial defendants have enforced AO 3-11 by selecting attorneys to include on the various panels and by removing non-panel attorneys from their existing cases. Compl. ¶¶ 15, 18-19. Thus, the plaintiffs' claims for injunctive and declaratory relief survive. *Consumers Union*, 446 U.S. at 736 (holding that when a court acts in an enforcement, as opposed to legislative capacity, a party may bring suit for injunctive and declaratory relief).

As the judicial defendants correctly note, "The Fifth Amendment provides that the government may not deprive a citizen of property without due process of law or take property without just compensation. Plaintiffs inappropriately conflate these two quite separate constitutional standards…indiscriminately alleging a 'Fifth Amendment taking of property without due process.'" Judicial Defs.' Mot. at 10. Out of an abundance of caution, the court will attempt to untangle the plaintiffs' claims and addresses the remaining claims under both "due process" and "takings" analyses.

D. The Plaintiffs' May Have A Property Interest in

Their Specialty Practice of Family Law

To prevail on either a due process or a takings claim, the plaintiffs must first establish that their specialty practice before the Family Division is a property interest. *C&E Servs., Inc. v. Dist. Of Columbia Water & Sewer Auth.,* 310 F.3d 197, 200 (D.C. Cir. 2002)(noting that to determine whether a plaintiff has stated a claim for deprivation of property without due process, "we first determine whether …[it] has a property interest that

triggers Fifth Amendment due process protection")(alteration in the original); *Wyatt v. United States,* 271 F.3d 1090, 1096 (Fed. Cir. 2001)(stating that "[i]t is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation")(citing, *inter alia, Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973)). The judicial defendants group counts XI, XIII and XV together as Fifth Amendment challenges to the creation of the panel system that fail due to the plaintiffs' lack of a cognizable property interest. Judicial Defs.' Mot. at 11. The judicial defendants claim that the plaintiffs do not have a property interest at stake because the property interest they assert is an "expectation of compensation for their services in appointed cases." *Id.* The plaintiffs counter by asserting that the property right at issue is broader than the defendants' characterization. The plaintiffs state that what the defendants have taken is their property interest in the specialty practice of law in the Family Division. Pls.' Opp'n to Judicial Defs.' Mot. at 9-11. Stated differently, the plaintiffs argue that the defendants' decision to precludes them from compensation in appointed cases impacts their practice so heavily that the defendants have effectively destroyed their ability to practice their legal specialty in the

Family Division.

Although the issue arose in a different factual context, the D.C. Circuit has instructed that under certain circumstances, a property interest in a specialty practice of law might be found. *Family Div. Trial Lawyers of the Superior Court - D.C. Inc. v. Moultrie*, 725 F.2d 695, 707 (D.C. Cir. 1984). *Family Division* involved a previous iteration of the Superior Court's appointment practices in juvenile and neglect cases. Under the previous regime, counsel were appointed from a list maintained by the D.C.

Public Defender Service and compensation was provided under the CJA. *Id.* At 699. When an attorney registered for CJA compensated work in the Family Division, the attorney was notified that he or she could be appointed to neglect cases on a *pro bono* basis. *Id.* at 699. When an attorney registered for CJA compensated work in the Family Division, the attorney was notified that he or she could be appointed to neglect cases on a *pro bono* basis. *Id.* The plaintiffs in *Family Division*, some of whom appear to be plaintiffs in the instant case, alleged that the forced *pro bono* regime constituted a taking of their labor in violation of the Fifth Amendment and a violation of the Thirteenth Amendment's prohibition against involuntary servitude. The Circuit dismissed the plaintiffs' Thirteenth Amendment argument, but remanded the plaintiffs' takings argument for further factual development. Specifically, the Circuit noted that if an appointment system "effectively denies the appellants the opportunity to maintain a remunerative practice as family lawyers before the Family Division, and that specialty practice is determined to be a 'property interest' it might effect an unconstitutional 'taking.'" *Id* at 706.

The Circuit went on to state that "[a] taking might occur if the following crucial findings were made: First, the attorneys' expectations of pursuing the specialty practice of

family law would have to be shown to be sufficiently established within norms and traditions of legal practice to constitute a property interest....Second, the number of Family Division cases where the parties can pay for their own counsel would have to be limited enough so that withdrawing from the market of government compensated cases would effectively be a decision to withdraw altogether from practice before the Family Division[.]" *Id.* at 707. Finally, the court held that "[t]he

assignment of uncompensated neglect cases attached to 'volunteering' for CJA compensated cases would have to be so burdensome that it effectively denies the appellants' ability to earn a living by practicing family law." *Id.* In sum, the Circuit stated, "[w]e rule today only that the existence of a property interest in [a specialty] practice [of family law] is a matter calling for material factual development and argument in the district court." *Id.* Here, the only difference in application is that the final prong is inapplicable because the plaintiffs do not challenge the *pro bono* system. Rather, they challenge the requirement of being placed on boards to receive appointed cases.

At this point in the litigation, the court cannot say that the plaintiffs do not have a property interest in a specialty practice of law in the Family Division. *Family Division*, 725 F.2d at 707. As outlined in *Family Division*, further factual development is necessary to determine if: (1) "the attorneys' expectations of pursuing the specialty practice of family law [can be] sufficiently established within the norms and traditions of legal practice to constitute a property interest; and (2) "the number of Family Division cases where the parties can pay for their own counsel [is] limited enough so that withdrawing from the market of government compensated cases would effectively be a decision to withdraw altogether from practice before the Family Division[.]" The plaintiffs allege, upon information

and belief, that indigent clients "represent at least ninety-five percent of the cases brought before the Family Court" and that the qualification procedures for determining indigence "lack formal and consistent requirements of proof of income and result in a significant number of persons qualifying for appointment of counsel who should not." Compl. ¶ 12. The court must accept these allegations as true for purposes of resolving

the motion to dismiss. *Macharia*, 334 F.3d at 64, 76. Because the plaintiffs may be able to demonstrate that they have a property interest in their specialty practice of family law, the court cannot say that the plaintiffs "can prove no set of facts in support of [their] claim that would entitle them to relief." *Warren,* 353 F.3d at 37. Accordingly, the court denies the judicial defendants' motion to dismiss counts XI, XIII and XV.[5]

Of course, at the motion for summary judgment stage, the plaintiffs will not be able to rely on mere conjecture, allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Rather, the plaintiffs will have to muster competent evidence that satisfies both prongs of the test outlined above. *Id.* The court notes, however, that even if the plaintiffs ultimately establish that they have a property interest in their specialty practice before the Family Division and that the defendants forced them to withdraw from practice before the Family Division, they still may not be able to establish a takings claim. *See, e.g., Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 130 (1978)(noting that a plaintiff cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they

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[5] Because the issue of whether or not an attorney's specialty practice is a property interest is unresolved at this point, the court cannot address whether the defendants deprived the plaintiffs of that interest without procedural safeguards sufficient to satisfy due process.

heretofore had believed was available for development"); *Family Division,* 725 F.2d at 706 n. 13 (stating that "the state, in the reasonable exercise of its police power, may frustrate even expectations that rise to the level of a property interest").

E. The Superior Court's Establishment of the Panel System was not *Ultra Vires*

The plaintiffs next request a declaratory judgment that the judicial defendants did not have authority to form the panel system through administrative orders and that the judicial defendants did not have the authority to limit the practice of law through administrative orders. Compl. ¶¶ 91-96, 102-106. The judicial defendants argue that creation of a panel system is well within the statutory authority of the Superior Court. Judicial Defs.' Mot. To Dismiss at 25. The judicial defendants are correct.

As noted in the court's previous discussion on judicial immunity, the authority to form the panel system stems from D.C. Code § 11-2602 and 16-2304(a). Section 11-2602 states in relevant part that counsel appointed pursuant to the CJA "shall in every case be selected from panels of attorneys designated and approved by the courts." D.C. Code § 11-2602. Thus, the plain language of the code directs the courts to create a panel system and gives the courts power to approve which attorneys will be named to the panels. Section 16-2304 states that an indigent child alleged to be delinquent or in need of supervision and indigent children and parents involved in neglect proceedings (which may result in termination of parental rights) are entitled to "counsel appointed in accordance with rules established by the Superior Court[.]" D.C. Code § 16-2304. Again, the plain language of the statute provides for the Superior Court to make rules governing the appointment of counsel.

The plaintiffs' reliance on D.C. Code § 11-2501 is misplaced. D.C. Code § 11-2501(b). provides the "[m]embers of the bar of the District of Columbia Court of Appeals shall be eligible to practice in the District of Columbia courts." D.C. Code § 11-2501(b). Without

providing any relevant legal analysis or support, the plaintiffs read § 11-2501(b) to prohibit the panel system because the panel system limits the practice of law. Pl.'s Mot. at 18-19. The court disagrees. The panel system does not prohibit any lawyer from practicing law in any division of the Superior Court. D.C. Code § 11-2602. What the panel system limits is the ability for lawyers to receive government compensation for appointed cases. The fact that there may only be a small pool of non-indigent clients may affect whether establishment of the panel system effects a taking, but it does not speak to the court's power to enact the panel system. Accordingly, the court dismisses counts XII and XIV of the complaint.

F. The Defendants Have Not Unconstitutionally Interfered with the Attorney Client Relationship

In count XVI of their complaint, the plaintiffs seek a declaratory judgment that the judicial defendants do not have authority to terminate the attorney-client relationship between the plaintiffs and their clients. Compl. ¶¶ 114-18. The defendants argue that the plaintiffs lack standing to assert interference with the attorney-client relationship. In their opposition, the plaintiffs fail to address the defendant's [sic] standing argument in any meaningful capacity. Instead, the plaintiffs set forth a disjointed argument regarding a purported First Amendment right to freedom of association in an attorney-client relationship. The plaintiffs provide no legal authority or analysis to support their

contention that an attorney has a First Amendment right to associate with a client.

"A litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

rights or interests of third parties." *United States Dep't of Labor v. Triplett,* 494 U.S. 715, 720 (1990)(internal quotations omitted). In their opposition, the plaintiffs quote extensively from *Harling v. United States*, 387 A.2d 1101, 1104-05 (D.C. 1978), for the proposition that an attorney and client have a right to be free from undue interference in their relationship. Pls.' Opp'n to Judicial Def.'s Mot. at 20. But, a fair reading of *Harling* makes clear that interference with the attorney-client relationship may deny the *client* his Sixth Amendment rights, not the attorney. *Id.* at 1104 (holding that "appellant was denied *his* Sixth Amendment right to counsel by the court's unwarranted interference with the relationship established between appellant and his attorney")(emphasis added). The plaintiffs have presented no persuasive authority or argument that an attorney has a right to maintain a relationship with a client and that a court may not interfere with that right. Accordingly, the court dismisses count XVI of the complaint.

G. Judicial Immunity Bars the Plaintiffs' Claims for Damages Against the PDS Defendants

The gravamen of the plaintiffs' complaint against the PDS defendants is that the PDS defendants are liable for damages because they qualified too many potential clients as indigent, thus "destroy[ing] the pool of clients available to counsel outside the appointment system." Compl. ¶ 12. The PDS defendants respond by asserting that any actions that they performed were in a judicial capacity, entitling them to judicial immunity.

Pursuant to D.C. Code § 11-2602, a judge presiding

over a juvenile case determines whether the defendant or respondent is "financially unable to obtain counsel," and if so "appoints counsel to represent that person." D.C. Code

§ 11-2602. By statute, PDS is directed to assist the court in determining the financial eligibility for appointed representation. *Id.* § 2-1602. Specifically, the D.C. Code requires PDS to "establish and coordinate the operation of an adequate system of private attorneys to represent [indigent] persons…but the courts shall have final authority to make such appointments." *Id.* § 2-1602(b).

Judicial immunity "extends to other officers of government whose duties are related to the judicial process." *Barr v. Mateo*, 360 U.S. 564, 569 (1959). As noted, the appointment of attorneys to represent indigent clients is a judicial act. *Chase*, 497 A.2d at 1068. The only actions that the PDS defendants are accused of taking involve assisting judges with the process of appointing attorneys to represent indigent clients. Thus, the only allegations against the PDS defendants involve their performance of judicial acts. Additionally, far from acting in absence of all jurisdiction, the PDS defendants acted in accordance with D.C. Code § 2-1602. Accordingly, the court concludes that the PDS defendants are entitled to judicial immunity and are immune from monetary damages. *See also Smith v. Rosenbaum*, 460 F.2d 1019, 1020 (3d Cir. 1972)(concluding that a county clerk has judicial immunity for the performance of ministerial acts mandated by statute). Finally, the PDS defendants argue that the court should dismiss count XIII against them because the plaintiffs cannot demonstrate that they have a property interest in their specialty practice of law, or alternatively, that their property interest has not been taken from them. PDS Def.'s Mot. at 26-27. Because the court cannot determine at this point whether the plaintiffs have a property interest in their specialty practice of law, the court denies the PDS defendants' motion to dismiss count

XIII.

IV. CONCLUSION

For the foregoing reasons, the court grants in part and denies in part the defendants' motions to dismiss. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 11th day of March, 2005.

RICARDO M. URBINA
United Stated District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAMELA H. ROTH *et al.*,	:
Plaintiffs,	:Civil Action No: 03-
	: 1109(RMU)
V.	:Document Nos.: 42,43
	:
RUFUS KING III, Chief	:
Judge of the Superior Court	:
of the District of Columbia,	:
et al.,	:
Defendants.	:

ORDER

GRANTING IN PART AND DENYING IN PART THE DEFENDANTS' MOTIONS TO DISMISS

For the reasons stated in the accompanying Memorandum Opinion, it is this 11th day of March, 2005,

ORDERED that the defendants' motions to dismiss are **GRANTED in part and DENIED in part.**

SO ORDERED.

RICARDO M. URBINA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAMELA H. ROTH *et al.*,	:
Plaintiffs,	:Civil Action No: 03-
	: 1109(RMU)
V.	:Document Nos.: 51,53, 55,
	: 57
RUFUS KING III, Chief	:
Judge of the Superior Court	:
Of the District of Columbia,	:
et al.,	:
Defendants	:

ORDER

GRANTING THE DEFENDANTS' MOTIONS FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 28 1292(B) AND TO STAY ALL PROCEEDINGS

This matter comes before the court on the defendants' motions for certification pursuant to 28 U.S.C. § 1292(b) and to stay all proceedings. Specifically, the defendants seek appellate review of the court's March 11, 2005 order denying the motion to dismiss the plaintiffs' Fifth Amendment claims. The court concludes that whether the plaintiffs may be entitled to injunctive or declaratory relief on their Fifth Amendment claims "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In addition, the court concludes that staying the

case until the D.C. Circuit's decision on the resultant appeal is in the best interest of justice. *Landis v. Am. Water Works & Elec. Co., Inc.*, 299 U.S. 248, 254 (1936)(noting that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants").

Accordingly, it is this 21st day of April, 2005,

ORDERED that the defendants' motions for certification pursuant to 28 U.S.C. § 1292(b) are **GRANTED**; and it is

FURTHER ORDERED that all proceedings in this case are **STAYED** until the D.C. Circuit resolves the resultant appeal.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 05-8008 **SEPTEMBER TERM, 2004**

03CV01109

FILED ON: JULY 29, 2005 [909094]

Pamela H. Roth, et al.,
Respondents

V.

Rufus G. King, III, as Chief Judge of the Superior Court of the District of Columbia, et al.

Petitioners

Does, 1-100
Respondent

BEFORE: Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), the opposition thereto, and the reply, it is

29

ORDERED that the petition be granted. See 28

U.S.C. § 1292(b). Approval of the petition is without prejudice to reconsideration by the merits panel.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Fed. R. App. P. 5 and collect the mandatory docketing fee from appellants. Upon payment of the fee, the district court is to certify and transmit the preliminary record to this court, after which the case will proceed in the normal course.

Per Curiam

NO. 05-7060 SEPTEMBER TERM, 2005

03CV01109

FILED ON: March 24, 2006

Pamela H. Roth, et al.,
Appellees and Cross-Appellants

V.

Rufus G. King, III, as Chief Judge of the Superior Court of the District of Columbia, et al.
Appellants and Cross-Appellees

Consolidated with 05-7061, 05-7062, 05-7063
05-7089

BEFORE: Sentelle, Rogers, and Griffith, Circuit Judges

ORDER

Upon consideration of the motion to remand, the motion to strike the motion to remand, and the opposition to the motion to strike; the motion for leave to file the motion to stay the briefing schedule and the opposition

thereto; and the lodged motion to stay the briefing schedule pending resolution of the motion to remand; it is

ORDERED that the motion to strike be denied.

Although appellees/cross-appellants have not demonstrated "good cause" for their failure to comply with this court's time limit for filing dispositive motions, see D.C. Cir. Rule 27(g)(1), the motion to remand raises a jurisdictional question that the court is obligation to consider even if not raised by the parties. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986); Beckett v. Airline Pilots Ass'n, 59 F.3d 1276, 1278 n.2 (D.C. Cir. 1995). It is

FURTHER ORDERED that appellants/cross-Appellees hand-deliver and hand file a response to the remand motion by April 4, 2006. Appellees/cross-appellants may hand-deliver and hand-file a reply by April 7, 2006. It is

FURTHER ORDERED that the motion to remand be referred to the merits panel to which this case is assigned. It is

FURTHER ORDERED that the motion for leave to file the motion to stay the briefing schedule be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that Appellees/cross-appellants' [sic] hand-deliver and hand-file their final reply and opening briefs by April 7, 2006.

The parties will be notified by separate order of the composition of the merits panel and the date of oral argument.

Per Curiam

D.B.S.
J.W.R.
J.B.G.